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Supreme Court, U.S.
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No. 97-897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL 922, UNITED STEELWORKERS OF AMERICA; and CHARLES A. ROYSTER,

Petitioner,

v.

BANDAG, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Robert A. Valois
Counsel of Record
Michael C. Lord
Maupin Taylor & Ellis, P.A.
Highwoods Tower One
3200 Beechleaf Court, Suite 500
Raleigh, North Carolina 27604
(919) 981-4000

20 pp

QUESTION PRESENTED

When management has the contractual mandate to develop and enforce work rules, may an arbitrator find that an employee violated the work rule against insubordination but then dispense his own brand of industrial justice by ignoring the predetermined penalty of discharge and instead creating a remedy not found in the collective bargaining agreement's work rules?

PARTIES TO THE PROCEEDING

Petitioner United Steelworkers of America, AFL-CIO-CLC; Local 922, United Steelworkers of America; and Charles A. Royster were Defendants-Appellants below. Bandag, Incorporated was Plaintiff-Appellee below.

Pursuant to this Court's Rule 29.6, Respondent Bandag, Incorporated notes that it is a publicly-held corporation; it has no parent company and, except as listed below, all subsidiaries are wholly owned:

Indag Rubber Limited

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page

Bruce Hardwood Floors v. Southern Council of Indus. Workers, 8 F.3d 1104 (6th Cir. 1993) 10

Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, Local Union No. 2713, 103 F.3d 449 (5th Cir.), *cert. denied*, 118 S. Ct. 329 (1997) 10, 11

Ficks Reed Co. v. Local Union 112, Allied Indus. Workers, 965 F.2d 123 (6th Cir. 1992) 9

First Nat'l Supermkts. v. Retail Food Employees Union Local 338, 118 F.3d 892 (2nd Cir. 1997) 7

Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261, 950 F.2d 95 (2nd Cir. 1991) 9

Hoover Co. v. Local 1985, IBEW, No. 95-4125 (6th Cir. Dec. 27, 1996) 7

McCleskey v. Kemp, 481 U.S. 279 (1987) ..... 9 n. 3

Midwest Coca-Cola Bottling Co. v. Allied Sales Drivers, Local 792, 89 F.3d 514 (8th Cir. 1996) 7, 8

Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union, 76 F.3d 606 (4th Cir.), *cert. denied*, 117 S. Ct. 80 (1996) 7, 12

Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964) 8, 9

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) 5

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 5, 6, 11

OTHER

American Zinc Co., 20 Lab. Arb. (BNA) 527 (1953) (Merrill, Arb.) 4

Elkouri & Elkouri: How Arbitration Works, (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) 4

APPENDIX

Letter from Joseph Coffey, United Rubber Workers International Representative, to Phil Huber, Personnel Manager (Aug. 9, 1990) 1a

STATEMENT OF THE CASE

The collective bargaining agreement ("CBA") negotiated between Bandag, Incorporated ("Company") and the United Steelworkers of America ("Union") directed the Company both to develop and post work rules and to discipline, suspend, and discharge its employees. App. 17a.

Pursuant to its contractual obligation, after negotiations and conferences, the Company posted a rule prohibiting insubordination. The rule expressly provides that its violation would constitute just cause for discharge. App. 18a. The Company's practice was to implement the stated sanction upon discovery of a violation. The Company discharged insubordinate employees without challenge by the Union.

The Substance Abuse Policy is the other relevant rule developed and posted by the Company. During the 1990 contract negotiations, the parties bargained over the terms of a drug and alcohol testing program. Res. App. 1a. The Substance Abuse Policy, implemented in 1990, authorizes the Company to require an employee for just cause to supply a urine sample for a drug test. App. 11a. Under the policy, just cause exists whenever an employee suffers a potentially compensable workplace injury. App. 11a-12a. The policy expressly provides that if an employee refuses to supply a specimen when requested, he will be discharged. App. 11a.

Employee Royster, upon request, refused to provide a urine sample in violation of the Company's work rule and drug policy. The Company followed the predetermined sanction and discharged him.

The Union filed a grievance, which was not resolved through the lower levels of the grievance procedure and proceeded to arbitration. Following an evidentiary hearing, the arbitrator agreed that Royster was insubordinate. App. 25a, 27a. Although the CBA's work rules provided no penalty for insubordination other than discharge and limited the arbitrator's function to interpreting and applying the CBA only, the arbitrator ordered the Company to reduce the discharge penalty to a thirty-day suspension, and to pay Royster for all time and benefits lost as a result of the discharge except for the first thirty calendar days of that period. App. 12a, 28-29a. The arbitrator afforded Royster leniency because he eventually provided the sample several hours later at the end of his shift, and because the arbitrator surmised that the Company considered Royster's union activities in its decision to discharge him.[1] App. 28a.

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[1]The arbitrator leapt to this conclusion without any supporting findings of fact. He specifically found only that a number of Company witnesses had testified of no recollection that Royster's past record was mentioned during discussions that resulted in his suspension and discharge. There was no finding that cited with any particularity the content of the testimony of any witness or evidence concerning Royster's union activity as a factor considered by the Company in deciding to discharge him.

Similarly, the recorded testimony yields no support for the conclusion that anti-union animus motivated the discharge. In response to the arbitrator's question, Administrative Manager Talley stated that Royster's past expressions of concern about safety and related issues were *discussed*, not considered, during the meeting in which the decision to discharge was made. When asked point blank on cross-examination by Union counsel whether the Company took any action against Royster for voicing these concerns, Talley replied, "Certainly not."

Not a scintilla of evidence exists to demonstrate any retaliation for Royster's union activities which had been open and obvious for years

(continued...)

Bandag filed a complaint in federal district court seeking to vacate the arbitration award. The parties filed cross-motions for summary judgment. The district court granted the Company's motion and vacated the arbitration award. The circuit court affirmed in an unpublished, *per curiam* opinion.

REASONS FOR DENYING THE WRIT

The Court's supervisory jurisdiction is neither necessary nor warranted in this case. The order of the fourth circuit is consistent with this Court's opinions. Moreover, there is no conflict of authority among the circuit courts on the issue presented. Before reaching these issues, however, the Company must first dispel the false impressions created in the Union's petition.

A. The Union misrepresents the genesis of the Company's work rule and policies. Misleading characterizations include: "Company promulgated" (Pet'r Br. 3), "company-promulgated policy" (Pet'r Br. 5), "company-promulgated work rules" (Pet'r Br. 6, 7, 9), "non-negotiated company work rules" (Pet'r Br. 6), "non-negotiated work rules" (Pet'r Br. 8, 12), and so on, in an attempt to convey the impression that the Union had no say whatsoever in the rule prohibiting insubordination or the Substance Abuse Policy, and no opportunity to discuss these mandatory subjects of bargaining. The fact is that the opposite is true. Res. App. 1a.

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[1](...continued)
prior to his discharge. In fact, the Company presented uncontradicted evidence that it had consistently enforced its work rule against insubordination. An employee's union activity does not insulate him from normal discipline.

The insubordination rule and the drug policy became part of the CBA. The Union was a full participant in the negotiations leading to their adoption. ***The Union never challenged the content of either the rule or the policy***. Furthermore, the Union never sought to negotiate a different insubordination rule or drug policy in 1992, 1994, 1995, or 1996[2] when new CBAs were signed. Asserting that neither the Union nor the arbitrator is bound by the CBA which incorporates the rule and policy because they were "non-negotiated" or "company promulgated" is a misstatement.

The concept advocated by the Union is refuted by the its own authority. "Under an agreement that vested in management the right to establish reasonable rules . . . [,] rules so established must be considered ***a part of the agreement***." *Elkouri & Elkouri: How Arbitration Works*, 765 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (emphasis added; quotation omitted).

> As a practical matter, it is not possible to embody in a collective bargaining contract a complete code of plant rules. Such a code would make the contract too long and cumbersome. It would introduce into collective bargaining new sources of delay and dispute. It would prevent the necessary adjustments and modifications of rules between periods of negotiation.

Id. (quoting *American Zinc Co.*, 20 Lab. Arb. (BNA) 527, 530 (1953) (Merrill, Arb.)).

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[2]Indeed, the parties reached the 1996 agreement ***after*** Royster's discharge.

Putting aside the absence of factual support, the Union's assertion is nothing more than an impermissible collateral attack on the Company's drug policy and work rules. Moreover, the attack comes too late. The Union waived the right to challenge the enforceability of the policy and insubordination rule by failing to raise the issue at any level of the grievance procedure. In vacating the arbitration award, the district court found "there has been no argument that Bandag's SAP [Substance Abuse Policy] or Work Rules were invalid." App. 13a. The Union's same argument before the circuit court met a similar fate. The Union simply cannot raise this issue for the first time during judicial review. In essence, the Union is advancing a hypothetical case to gain review.

B. The circuit court faithfully applied this Court's holding in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), that

> an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Accord United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)("arbitrator may not ignore the plain language of the contract"). Upon finding that Royster had been insubordinate, the arbitrator was bound by the CBA to find that just cause existed to support Royster's ***discharge***, not that just

cause existed to support ***lesser discipline***. The arbitrator's duties were concluded when the arbitrator found that Royster had been insubordinate and that the predetermined penalty had been applied. He abused his commission when he dispensed his own brand of industrial justice.

By converting Royster's discharge into a disciplinary suspension, the arbitrator did not do his job. Instead, he ignored the unambiguous language of both the substance abuse policy and the work rule against insubordination, and rewrote the CBA by fashioning a modified penalty that appealed to his own notions of right and wrong. The arbitrator invented an individualized exception to the strict application of the substance abuse policy and the work rule prohibiting insubordination. The arbitrator's award deprived Bandag of the benefit of its bargain with the Union.

Federal courts necessarily give great deference to arbitration awards. Deference, however, does not equate with a requirement to enforce all arbitration awards; they are not, as suggested by the Union's argument, immune from scrutiny. Because arbitration provisions in CBAs are voluntary, it would undermine the public policy of encouraging alternative dispute resolution if arbitration awards were not reviewable to ascertain an arbitrator's fidelity to the provisions of a given CBA. In accordance with *Enterprise Wheel*, the circuit court furthered this policy by affirming the district court's vacation of the award because the arbitrator departed from the CBA on a frolic of his own.

C. The Union asserts that the decision below conflicts with the decisions of the second, sixth and eighth circuits. The assertion is meritless and a contrivance to create the impression of a split of authority where there is no such split.

The Union's hunt for divergence among the circuit courts begins with *First National Supermarkets v. Local 338*, 118 F.3d 892 (2nd Cir. 1997). *First National* is inapposite because the second circuit would not apply the *Mountaineer Gas* case due to the particular provisions of the CBA at issue. *Id.* at 897. The *First National* CBA specifically reserved to the arbitrator the power to determine whether a discharge was for just cause. *Id.* at 894. The contract did not limit his authority as did the *Bandag* CBA. *Cf.* App. 12a. Moreover, unlike the present case, there was no separate article in the *First National* CBA which outlined management's duty to make and enforce work rules. *Cf. First National*, 118 F.3d at 894 *with* App. 10-11a.

The Union next relies on the sixth circuit's unreported decision of *Hoover Co. v. Local 1985, IBEW*, No. 95-4125 (6th Cir. Dec. 27, 1996). *Hoover* is easily distinguished. First, the specific language of the no call/no show work rule in *Hoover* is not disclosed. App. 32a. What is known is that the insubordination rule in *Bandag* defines the CBA's just cause language and that the rule plainly provides that insubordination shall constitute "just cause for discharge." App. 11a. Thus, in *Bandag*, the arbitrator did not have to determine if Royster's misconduct constituted just cause; the contractually-mandated rule told him so. Second, the *Hoover* arbitrator failed to state explicitly whether he found that the employee had violated the work rule. App. 33a. The *Bandag* arbitrator, in contrast, repeatedly found that Royster was insubordinate. App. 25a, 27a. Third, the *Hoover* CBA apparently did not limit the arbitrator's authority in the manner prescribed in the present case. *Cf.* App. 34a *with* App. 12a.

Lastly, to support the "split" hypothesis, the Union cites the decision of *Midwest Coca-Cola Bottling Co. v. Allied Sales Drivers, Local 792*, 89 F.3d 514 (8th Cir. 1996). The eighth

circuit distinguished its holding in *Midwest Coca-Cola* from its other decisions involving different contract language. The court noted that the CBA in *Midwest Cola-Cola* was unlike the one in *Bandag* which allowed companies to discharge employees for specific offenses ***as well as*** for just cause. *Id.* at 517-18. The court discussed *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562 (8th Cir. 1964), in which a company discharged an employee for falsifying a work record. In *Truck Drivers*, the proper cause provision in the CBA was defined with a list of discharge offenses, including dishonesty. Because proper cause was explicitly defined for the arbitrator to include specific offenses, and the employee's conduct fell within one of the listed offenses, the discharge was proper under the terms of the contract. The *Midwest Coca-Cola* court also distinguished *Truck Drivers* in that the contract provided that dishonesty "shall be grounds for discharge." *Midwest Coca-Cola*, 89 F.3d at 518.

The CBA in *Bandag* is similar to the one in *Truck Drivers*. First, the Company retains the express right to discipline and discharge employees for just cause. The insubordination rule and substance abuse policy expressly provide that their violation shall result in a discharge. Therefore, the parties agreed as to what would constitute just cause for discharge. The CBA did not contemplate that an arbitrator could find that an employee committed insubordination and then further consider whether just cause existed to discharge that employee. Such an inquiry would be redundant, and contrary to the intentions of the parties. Contract language is key to the determination of whether an arbitrator exceeded his authority and the courts below properly concluded that the arbitrator did just that.

In sum, the differences between the opinions below and those of the second, sixth and eighth circuits are due to

differences in the underlying CBAs. As conceded by the Union, "there is great diversity among collective bargaining agreements.[3] Pet'r Br. 14. Virtually all CBAs are independently negotiated to fit a specific group of employees. Contracts differ to reflect industry type, geography, size, management organization, sophistication, and a myriad of other factors. Because each CBA is different, each court decision will be different in its application of the unique facts to the specific contract language at issue. The standard of judicial review, however, does not change. The circuit courts -- even those cited by the Union -- consistently have held that an award cannot draw its essence from a CBA where an arbitrator ignores the plain language of the contract and fashions his own remedy which satisfies his personal notions of industrial justice. *Ficks Reed Co. v. Local Union 112, Allied Indus. Workers*, 965 F.2d 123, 126 (6th Cir. 1992); *Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261*, 950 F.2d 95, 99 (2nd Cir. 1991); *Truck Drivers*, 330 F.2d at 565-66.

D. The Union further contends that circuit disagreement exists over the degree of "deference which must be given to an arbitrator's determination that just cause is lacking, despite contractual language purporting to give an

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[3]Nevertheless, the Union relies on statistics from a study published in 1992 to assert that the varying rate of enforcement by the circuit courts of arbitration awards is attributable to the amount of deference each court gives to awards. Pet'r Br. 14 & n. 3. The inference which the Union attempts to draw from the statistics must be viewed with suspicion. Each particular award is unique, and a federal court's review rests on the particular facts found and language of the CBA. It is unreasonable to extrapolate from the study that the circuit court in *Bandag* paid only "lip service" to this Court's decisions (Pet'r Br. 17). *See McCleskey v. Kemp*, 481 U.S. 279, 293-99 (1987)(unique nature of capital punishment decisions counsels against adopting inference of discriminatory action from statistical disparities indicated by study).

employer the unequivocal right to discharge under certain circumstances." Pet'r Br. 7. To illustrate the supposed split, the Union selected two cases to discuss, *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir.), *cert. denied*, 118 S. Ct. 329 (1997), and *Bruce Hardwood Floors v. Southern Council of Industrial Workers*, 8 F.3d 1104 (6th Cir. 1993). Both cases involved the same company and union; however, the contract language at issue in the two cases is substantially different.

The applicable contract language before the sixth circuit allowed the just cause analysis of an arbitrator to include "appropriate mitigating or aggravating circumstances." 8 F.3d at 1108. Additionally, the CBA provided only that an employer "may" discharge an employee for committing one of a list of enumerated offenses. *Id.* The arbitrator, therefore, considered a number of fact-specific mitigating factors in reinstating an employee who had committed a listed offense. The district court found that the arbitrator's award did not draw its essence from the contract, but the sixth circuit disagreed. The court found that the arbitrator made an award consistent with the express contract provision to consider mitigating circumstances as opposed to his own "general considerations of fairness and equity." *Id.* Thus, the precise language contained in the CBA was critical to the sixth circuit's holding.

The CBA considered by the fifth circuit contained no such ambiguities. The CBA required immediate discharge for certain listed offenses, including lying, to which the grievant expressly admitted. 103 F.3d at 452. Although the arbitrator found that the grievant, in fact, lied, he deemed it worthy only of progressive discipline. *Id.* at 451. He nevertheless failed to employ the progressive discipline as outlined in the CBA, instead mandating an arbitrary 10-day suspension for the

grievant. *Id.* The CBA, however, restricted the arbitrator's authority to venture outside the contract by prohibiting him from adding to, amending or departing from the terms of the agreement. *Id.* at 452. The fifth circuit vacated the award because the arbitrator's exaction of his own penalty amounted to a rewriting of the CBA contrary to his authority. *Id.*

Again, no conflict among the circuit courts exists; the apparent differences in the opinions of the fifth and sixth circuits are attributable to the differences in the applicable CBAs. *Bandag* is a decision involving unique facts and contract language in which the courts below properly applied the standard of judicial review enunciated by this Court. The present case is important only to the parties. The unreported decision will not encourage other parties to arbitration to seek to vacate awards involving different facts and different contract language. The circuit court's affirmance of the district courts *vacatur* will not open the floodgates into federal courts. Indeed, as the Union concedes, "only a small number of arbitration awards are appealed to the courts." Pet'r Br. 19.

Nor does the Company believe, as speculated by the Union (Pet'r Br. 22), that arbitrators in the future will abdicate their duty of fidelity to a given contract and camouflage their own notions of industrial justice by either issuing only conclusions, like "grievance upheld," or issuing no opinion at all. Bandag is simply one of those cases in which the arbitrator's decision is not due judicial respect. This Court does not need to repeat or redefine an already clear standard for review of arbitration awards, because those few cases when *Enterprise Wheel* should be applied to vacate awards can be determined by the lower courts.

E. The court has recently denied *certiorari* in similar cases. *Bruce Hardwood Floors v. UBC, Southern*

Council of Indus. Workers, Local Union No. 2713, 103 F.3d 449 (5th Cir.), *cert. denied*, 118 S. Ct. 329 (1997); *Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union*, 76 F.3d 606 (4th Cir.), *cert. denied*, 117 S. Ct. 80 (1996). This case raises no new issues. In reality, the Union, disappointed with the results below, simply disagrees with the circuit court's holding. The Court should not grant *certiorari* merely to provide the Union yet another opportunity to plead its case.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

Robert A. Valois
Counsel of Record
Michael C. Lord
Maupin Taylor & Ellis, P.A.
Highwoods Tower One
3200 Beechleaf Court, Suite 500
Raleigh, North Carolina 27604
(919) 981-4000

February 2, 1998

APPENDIX

URW United Rubber, Cork, Linoleum &
Plastic Workers of America, AFL-CIO,
CLC International Union

rec'd Union 8/9/90

87 South High St.
Akron, Ohio 44308-1893
216/376-6181
FAX 216/434-5230

[UNION SEAL]

Milan O. Stone, *President*
Joseph H. Johnston, *Vice President*
Kenneth L. Coss, *Secretary-Treasurer*

August 9, 1990

Dear Mr. Huber:

This letter will serve to acknowledge that during 1990 contract negotiations, Bandag and URW Local 922 bargained over the terms of a drug and alcohol testing program. While the parties failed to agree on the terms of a program, it is acknowledged that the negotiations were concluded in good faith and that Bandag has fulfilled its obligations under the National Labor Relations Act to bargain over the matter. It is further acknowledged that during the term of this agreement, Bandag may establish a reasonable work rule dealing with drug/alcohol testing.

Sincerely,

"s/Joseph Coffey"

Joseph Coffey
URW International Rep

JC:clc
opeiu 339

United for Freedom UNION YES [LOGO]